Supreme Court, U. S.
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No. 77-33

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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EDDIE A. TURNER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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WADE H. MCCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on two counts of willfully supplying false and fraudulent income tax withholding certificates to his employer in 1972 and 1973, in violation of 26 U.S.C. 7205. He was sentenced to six months' imprisonment, placed on probation for 18 months, and fined $500 (R. 292).[1] The court of appeals affirmed *per curiam* (Pet. App. B-1 to B-2).

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[1]The record in this Court consists of six volumes. The original record on appeal, or clerk's transcript, is designated "R." Volumes II, III and IV are supplemental records of pretrial and post-trial proceedings. Volume V, the transcript of trial proceedings, is designated "Tr." Volume VI consists of the proceedings in the court of appeals.

Petitioner contends that the evidence was insufficient to support the verdict and that he is the victim of discriminatory prosecution.

The evidence adduced at trial may be summarized as follows: During 1972 and 1973 petitioner, a tax protester, was employed as a registered nurse-anesthetist by a Plainview, Texas, hospital, at a salary of $1,500 per month (Tr. 209-211, 217, 238-239). In November, 1972, petitioner filed with his employer, an employee's withholding allowance certificate (Form W-4) claiming 20 dependents (Govt. Exs. B-5, C-1; Tr. 219-221, 231, 242-244, 262-263, 267-268). Petitioner advised the hospital's personnel director that he did not want any income tax deducted from his check and that he had joined a "group of people" and would take care of his tax liability at the end of the year as he saw fit (Tr. 221, 231). On the basis of this certificate, the income tax withheld from petitioner's paycheck was reduced from $117.89 to $14.09 (Tr. 222). A fellow employee at the hospital testified that petitioner once told her that he was claiming 20 dependents, including his wife, two children, dogs, horses and other animals that he owned (Tr. 267-268), and that he stated he was part of a national group with "the same thing in mind" and offered to make literature available (Tr. 270).

Two months later, petitioner filed a second false withholding certificate, which claimed 30 allowances and had the effect of reducing the tax withheld to zero (Tr. 223-224). He stated that the 20 allowances had not entirely eliminated the withholding and that he was raising it to 30 in order to eliminate withholding altogether (Tr. 245). Petitioner's 1971 income tax return (Govt. Ex. A-1) shows that petitioner claimed only four exemptions, consisting of himself, his wife, and their two children (Tr. 164-166).



1. Contrary to petitioner's argument (Pet. 6-13), the jury could readily have inferred that petitioner was guilty of filing false withholding certificates. See *United States* v. *Smith*, 487 F. 2d 329, 330 (C.A. 9), certiorari denied, 416 U.S. 989; *United States* v. *Ducharme*, 505 F. 2d 691, 692 (C.A. 9); *United States* v. *Malinowski*, 472 F. 2d 850, 853 (C.A. 3), certiorari denied, 411 U.S. 970. Indeed, the inference that petitioner willfully falsified the claims of 20, and then 30, allowances is inescapable.

Petitioner's defense was that he might have had allowable deductions sufficient to warrant such a claim. But that would mean that he may have had deductible interest, taxes, charitable contributions, and the like, of $12,000 to $19,500 per year, despite the fact that his gross income was only $18,000 per year. There is no evidence of such deductions.

2. Petitioner also argues (Pet. 13-17) that he was the victim of discriminatory prosecution. In the district court, petitioner moved for a hearing and a judgment of dismissal "upon the grounds that * * * [he was] being subjected to prosecution, in a discriminate manner, for political reasons and for the reason that he has espoused in public * * * his opposition to the federal tax laws, the federal tax policies and the unconstitutional money system in effect in the United States * * *" (R. 88).[2]

Petitioner, describing himself as an "aggressive, loudmouth organizer of tax protestors" (Pet. 17), argues that

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[2]The record does not show the disposition of this motion and it does not appear that petitioner ever pressed the district court for a decision. The motion might well have been denied on the ground that it was filed out of time. On May 6, 1975, the district court, in response to a request by petitioner, granted additional time until May 9, 1975, to file any further motions. The motion was not filed until May 12, 1975 (see R. 95, 100).

this prosecution "infringe[s] upon constitutionally guaranteed freedoms" (Pet. 13). At bottom, this argument amounts to the contention that anyone may violate a federal statute and then insulate himself against prosecution by publicly boasting of his conduct and urging others to follow his example. But the government appropriately may "make an example," by prosecution, of one who urges others to follow his example of criminal conduct. Indeed, such prosecution may be necessary to preserve respect for the law; a prosecution based upon such grounds is not impermissibly selective. Cf. *Oyler* v. *Boles*, 368 U.S. 448, 456; *Edelman* v. *California*, 344 U.S. 357, 359; *Washington* v. *United States*, 401 F. 2d 915, 925 (C.A. D.C.).

Petitioner has not shown that his selection was based on an impermissible ground such as race or religion. Cf. *United States* v. *Oaks*, 527 F. 2d 937, 940 (C.A. 9), certiorari denied, 426 U.S. 952; *United States* v. *Scott*, 521 F. 2d 1188, 1195 (C.A. 9), certiorari denied, 424 U.S. 955; *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (C.A. 2); *United States* v. *Swanson*, 509 F. 2d 1205, 1208 (C.A. 8). Nor has he alleged that other taxpayers similarly situated generally have not been prosecuted. In these circumstances, there is no substance to his claim that his prosecution was not undertaken in good faith and in a nondiscriminatory manner. See, *e.g.*, *United States* v. *Falk*, 479 F. 2d 616, 620 (C.A. 7).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
*Solicitor General.*

AUGUST 1977.